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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1059

[redacted], FORTH CORPORATION, LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED,

Petitioners,

vs.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

JOINT PETITION OF FORTH CORPORATION AND LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 16, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit in Cause No. 73-1237 is reported in 504 F.2d 104, 1974. A copy of the Opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 16, 1974. A joint petition for rehearing was denied by the Court of Appeals on Novemebr 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A copy of the ruling on the Joint Petition for Rehearing is attached hereto as Appendix B.

QUESTIONS PRESENTED

[1] Did the Court of Appeals err when it weighed the evidence contrary to Rule 52(a) F.R.C.P. and determined that the findings of fact setting forth the contributory negligence of Allegheny Airlines, Inc. were clearly erroneous?

[2] Did the Court of Appeals err in determining that Forth Corporation was vicariously liable for the acts of the pilot pursuant to the Indiana Uniform Aeronautics Act, which holding is in contradiction with other circuits interpreting similar statutes?

[3] Whether or not the application of the doctrine of collateral estoppel against a litigant deprives a litigant of his right for trial by jury.

STATUTES INVOLVED

The federal statutes involved are 49 U.S.C. 1301(26) [which was redesignated in 1974 as 49 U.S.C. 1301(28)]. The legislative acts of the Indiana Legislature involved are Indiana Codes §§ 8-21-3-1(h) [Burns Ind. Stat. Annot. § 14-109(h)], 8-21-4-5 [Burns Ind. Stat. Annot. § 14-106] and 8-21-4-8 [Burns Ind. Stat. Annot. § 14-109]. These statutes are set forth in Appendix C.

REASONS FOR GRANTING THIS WRIT

Admittedly the most compelling question involving the aviation industry, the legal profession, and the insurance

industry, which has arisen as a result of the mid-air collision at Fairland, Indiana on September 9, 1969, is set forth in the joint petition for writ of certiorari in the companion case of Forth Corporation, et al vs. Allegheny Airlines, et al, which is being filed contemporaneously with this petition.

This was only the property damage case which was tried after Allegheny Airlines, Inc. and the United States of America had voluntarily compromised all of the passenger claims on a joint basis.

While we contend that the Court of Appeals for the Seventh Circuit set forth erroneous principles of law and fact in its opinion of September 16, 1974, three of those errors stand out as matters of the greatest of public interest and seemingly are of such importance as to require the attention of this Court.

First, we contend that the Court of Appeals violated the principles and the spirit of Rule 52(a) F.R.P.C. by weighing the evidence. This is becoming a matter of prime concern in not only the legal profession but to the judiciary at the trial court level. As shown in other parts of this brief, the opinion of the Court of Appeals is replete with language showing that they attached credibility to some witnesses, refused to consider the testimony of other witnesses as substantial and, in general, determined the facts for themselves.

It is our belief that where such an obvious violation of Rule 52(a) F.R.C.P., as shown by the opinion, this Court should speak on the subject of whether it shall be the modern trend of the law to permit courts of appeal to take the place of a trial judge as a thirteenth juror. If this be the desire of this Court, then the legal profession and judiciary should so be informed.

Secondly, we raise the question of whether the absentee owner of an aircraft can be charged with responsibility

for the careless and reckless operation of his aircraft by another. This matter is of great concern to the vast general aviation industry including the flying schools, the airports, and the more-than-two-hundred-thousand private aircraft owners. It is of great import to the insurers who agree to indemnify the owners of the aircraft because it plays an important part in the premiums charged by these insurers. It is important to the Courts who are confronted with more and more of this type lawsuits. Primarily, it is important that this Court speak upon this subject because, as shown elsewhere in this petition, the law is in a state of complete confusion and the decision of the Court of Appeals for the Seventh Circuit further compounds a hundredfold the problems already facing courts to interpret the various statutes involved.

Third, the matter of collateral estoppel being available to co-defendants with the United States of America in a Federal Tort Claims case is a paramount issue to the federal trial courts. There is an ever growing tendency in the federal court system to join the United States of America, who can be sued only under the Federal Tort Claims Act without a jury, and a private citizen entitled to a trial by jury in the same cause of action. While this matter was not directly decided by the Court of Appeals the footnote to the opinion raises the question that the only proper way for a court to handle this situation is to have an advisory jury. This is no solution because either the trial court has to follow the jury's recommendations which, in effect, abrogates the intent of the Federal Tort Claims Act, or you have two triers of the fact hearing the same evidence, in the same courtroom, rendering conflicting decisions. It is imperative that this apparent irreconcilable conflict be ruled on by this Court so that the legal profession and the federal judiciary can be in-

formed as to the proper procedure when confronted by this situation in the future.

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STATEMENT OF THE CASE

Factual Background

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indiana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert W. Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

At the time of the mid-air collision, the Allegheny DC-9 was being operated under an instrument flight rules clearance from Cincinnati, Ohio to Indianapolis, Indiana and was receiving air traffic control directions from the Federal Aviation Administration facilities located at Weir Cook Airport in Indianapolis. The Piper Cherokee aircraft was being operated under visual flight rules on a cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana.

Allegheny Airlines, Inc. and GECC Leasing Corporation commenced this case in the United States District Court for the Southern District of Indiana as Cause No. IP 70 C 609. The Defendants were the United States of America, Forth Corporation, Brookside Corporation and Lee LeMay, Administrator of the Estate of Robert W. Carey, Deceased. Jurisdiction was based on diversity of citizenship and the Federal Tort Claims Act.

Proceedings in the District Court

The case against the United States of America was under the Federal Tort Claims Act and tried before The

Honorable Cale J. Holder without the intervention of a jury contemperaneously with the case against Forth Corporation, Brookside Corporation and Lee LeMay, Administrator, et al, with a jury sitting.

All evidence was presented by the plaintiffs in the presence of both Judge Holder and the jury.

At the conclusion of the plaintiffs' case, the United States of America filed its motion for judgment on the evidence pursuant to Rule 41(b) F.R.C.P. The remaining defendants filed their motions for judgment on the evidence and the motions of Forth Corporation and Lee LeMay, Administrator, et al, were overruled. The motion of Brookside Corporation was sustained.

The Court then entered its findings of fact pursuant to Rule 41(b), F.R.C.P. concluding that the plaintiffs were guilty of contributory negligence. A copy of the pertinent findings of fact are attached as Appendix D.

Subsequent to the Court's findings of fact and judgment in favor of the United States of America, the Defendants Forth Corporation and Lee LeMay, Administrator, et al filed their motion for summary judgment on the theory that the plaintiffs were collaterally estopped from recovery against the Defendants Forth Corporation and Lee LeMay, Administrator, et al, by reason of the judgment of the Trial Court in favor of the United States of America and finding contributory negligence on behalf of the plaintiffs. Said motion for summary judgment was sustained and judgment entered for the Defendants Forth Corporation and Lee LeMay, Administrator, et al.

The Trial Court also found that GECC Leasing Corporation was not the real party in interest and dismissed its claim.

Proceedings in the Court of Appeals

Allegheny Airlines, Inc. and GECC Leasing Corporation both appealed from the adverse judgments.

The case was argued before the United States Court of Appeals for the Seventh Circuit on February 14, 1974 before The Honorable Luther M. Swygert, The Honorable Roger Kiley and The Honorable Julius J. Hoffman, who was sitting by designation. The Honorable Roger Kiley died September 6, 1974. This case was decided September 16, 1974. A footnote to the opinion states, "Judge Kiley approved this opinion before he died on September 6, 1974".

The opinion of the Court of Appeals upheld the Plaintiffs Allegheny Airlines, Inc. and GECC Leasing Corporation in almost every point of contention raised in the brief. The opinion in most instances is verbatim with the brief of the Appellants.

The Court of Appeals decided that the findings of fact of Judge Holder were clearly erroneous and not supported by substantial evidence.

Having determined that the findings of fact of the Trial Judge were clearly erroneous the Court of Appeals then found that the motion for summary judgment in favor of the Defendants-Appellees Forth Corporation and Lee LeMay, Administrator, et al, based on the doctrine of collateral estoppel had to fail. By footnote, the Court of Appeals further stated that the plaintiffs were deprived of a trial by jury by entering a judgment for collateral estoppel.

The Court of Appeals further found that Forth Corporation was vicariously liable for the acts of Robert W. Carey who had leased the aircraft from Forth Corporation by reason of certain Indiana statutes and construed such statutes, which were taken verbatim from 49 U.S.C.

1301(26), which holding was contrary to interpretations of other districts on similar statutes.

While the jurisdiction of the Court was based on diversity of citizenship, the Court of Appeals determined that there was sufficient evidence to show joint enterprise between Forth Corporation and Robert W. Carey, contrary to the law of the State of Indiana.

Forth Corporation and Lee LeMay, Administrator, et al, filed a joint petition for rehearing *en banc*. The United States of America filed its separate petition for rehearing. The petitions were denied on November 26, 1974, with two of the Circuit Judges voting to grant said petition for rehearing *en banc*.

• • •

I.

Did the Court of Appeals err when it weighed the evidence contrary to Rule 52(a) F.R.C.P. and determined that the findings of fact setting forth the contributory negligence of Allegheny Airlines, Inc., were clearly erroneous?

While the Trial Court made five findings of fact as to the contributory negligence of Allegheny Airlines, Inc., without waiving any of said points in the event of remand, we will set forth only two of the findings with the evidence in support thereof to show that Judge Swygert in his opinion improperly weighed the evidence thus failing to follow the principles of this Court in the construction of Rule 52(a) F.R.C.P.

The pertinent part of Rule 52(a) is as follows:

> "(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

> given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the case of *Zenith Radio Corp.* v. *Hazeltine Research*, 395, U.S. 100, 23 L.Ed.2d 129, 89 S. Ct. 1562, 1969, Mr. Justice White stated:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'"

This is not a question of the trial court interpreting evidence one way and the reviewing court interpreting the evidence in a different way. This part of the petition is based solely upon the proposition that the Court of Appeals completely disregarded the prevailing rule against its right to weigh conflicting evidence, usurped the right of the Trial Court, as the trier of the fact, to determine the credibility of evidence and failed to recognize the proposition that the Trial Court was in a superior position to apprise and weigh the evidence.

Two of the findings of fact of the Trial Court which led to its holding of contributory negligence on the part of Allegheny Airlines, Inc. are:

> [1] The collision occurred . . . five hundred feet (500') or more below the base of the clouds. [2] Allegheny . . . failed to exercise ordinary care . . .

> under all the circumstances . . . in that its crew conducted the aircraft descent from cruise altitude at a descent rate which was excessive under the circumstances through clouds and which would not permit plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1,000′) above the assigned altitude of two thousand five hundred feet (2,500′).

The first point to be considered is whether the finding of fact that the mid-air collision occurred more than five hundred feet (500′) below the base of the clouds was clearly erroneous. We submit that the Court of Appeals had to weigh the evidence to arrive at this conclusion rather than follow the standard set forth under Rule 52(a). The evidence admitted at the trial as to the height of the cloud base at the accident site consisted mainly of estimates and opinions given by pilots flying in the area between a period of forty minutes before the established time of the collision and forty minutes after.

The collision occurred over the cornfield. There were no trained weather observers at the site and the only evidence presented by the plaintiffs as to the cloud base was from a weather observer at Weir Cook Airport, pilots and witnesses in the area and a weather expert who based his opinion upon the weather maps and reports available on the date of the collision. His conclusion was made many months after the collision as he was not present at the site nor had he visited the site. See the chart attached as Appendix E.

The trained weather observer who gave testimony was one Mr. Evan McColly [Tr. P. 148]. He stated that at 1940 g.m.t. or approximately ten-to-eleven minutes after the collision, he made a special observation at Weir Cook Airport with the aid of a ceilometer. He observed the cloud base to be at 4197 feet m.s.l. with a sixty-to-ninety

percent coverage of the sky [Tr. P. 454-6]. The visibility was fifteen miles which he stated was "what you can see" for fifteen miles in one direction [Tr. P. 459]. The observation made by Mr. McColly at 1940 g.m.t. was a measured observation in the manner prescribed by the United States Weather Bureau. The site of the collision was approximately twenty miles southeast of Weir Cook Airport and the evidence was that the collision occurred at 3600 feet m.s.l. or 3628 feet m.s.l. The wind direction was moving weather southeasterly. With a cloud cover of sixty-to-ninety percent, in a fifteen mile radius, there were numerous holes in the cloud base.

Mr. C. Harvey Bradley, Sr., now deceased, was flying in the area of the crash site a few minutes after the accident occurred. He had been dispatched there by the airport controller when it had been determined that the DC-9 was down. He testified he did not think there was any difference between the cloud base at Weir Cook and the cloud base at the accident site [Tr. P. 3431]. Captain Johannesen, an American Airlines pilot who came into Weir Cook Airport over the general area approximately twenty minutes prior to the agreed time of the mid-air collision, testified that in his opinion the cloud base in the area of the accident scene was substantially of the altitude of that at Weir Cook Airport. Mr. Bradley estimated the cloud base at approximately 3900 feet m.s.l. Captain Johannesen estimated the cloud base at 3500 feet m.s.l.

With these two learned men making estimates of a rather uniform cloud base between Weir Cook and the site of the mid-air collision, with the weather moving southeasterly, and with an actual measured cloud base showing some sixty-to-ninety percent coverage by a trained weather observer with a mechanical measuring device, at 4197 feet m.s.l., the Trial Judge, based upon the credibility of all other witnesses, determined that the mid-air collision oc-

curred more than 500 feet below the cloud base. This was in keeping with the weather observation by trained expert and the agreed altitude of the collision between 3600 and 3628 feet m.s.l.

Certainly the Trial Judge had more than substantial evidence upon which to base this finding of fact.

To show that Judge Swygert in his opinion weighed the evidence rather than follow Rule 52(a), we call the Court's attention to such statements as, "in our judgment the evidence emphasized by the defendants cannot reasonably support the inference . . . the clouds above the accident site were 4197 feet m.s.l. We do not think this evidence is of such persuasion as to avoid a determination that the court's finding was clearly erroneous." Again, the opinion sites, "Allegheny has produced an abundance of evidence," and "Allegheny's evidence is persuasive that the Piper Cherokee aircraft piloted by Carey was closer to the clouds than the required distance of 500 feet." Also, Judge Swygert said, "Defendants urge that even in the face of this evidence which is highly supportive of Allegheny's contentions. . . ."

In footnote four the Court said, "We only note there was substantial evidence favorable to the plaintiffs as to the altitude of the clouds."

As to the second finding as set forth above, the mid-air collision occurred between 3600 feet m.s.l. and 3628 feet m.s.l. [Tr. P. 568-570]. The DC-9 was descending at a rate of 2350 feet per minute and forty feet per second during the last minute of its flight [Tr. P. 582-584]. The assigned altitude which the DC-9 was to reach was 2500 feet m.s.l. [Tr. P. 2420].

The parties entered into a stipulation that the prevailing rule of conduct was, "if an altitude change of more than 1000 feet is required, descend or climb as rapidly as practical to 1000 feet above or below the assigned altitude and

then attempt to descend or climb at a rate of 500 feet per minute until the assigned altitude is reached," [Tr. P. 3966-3971]. In this case the evidence showed that the DC-9 was descending in excess of four times the rate of 500 feet per minute at a point approximately 100 feet above the point where he should attempt to slow the rate of descent to 500 feet per minute.

The case was tried under Indiana law and the test for negligence is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances.

Pierce v. *Horvath,* 142 Ind. App. 278, 233 NE2d 811, 1966. In considering due care, one must always consider the surrounding conditions and circumstances.

The pilot of the DC-9 was descending his aircraft through clouds in preparation for a landing at Weir Cook Airport. The aeronautical chart of the area showed several small airports within a twenty-five mile radius of Weir Cook Airport [Tr. P. 954-958]. The plaintiffs' expert testified that at the rate of descent which the undisputed evidence showed the DC-9 to be descending, needed nineteen to twenty-eight seconds to avoid another aircraft under the circumstances as they existed at the time of the mid-air collision [Tr. P. 4215-4218]. The undisputed evidence was also that if an aircraft descending at 2350 feet per minute broke out of the clouds he would have twelve to fourteen seconds to see and avoid a plane 500 feet below the clouds. Therefore, under Allegheny Airlines' evidence the DC-9 pilots were descending at such a rate under the circumstances that as they broke out of the clouds and immediately saw a plane 500 feet below, they could not avoid hitting it. In the case of *United States* v. *Miller,* 303 F.2d 703, 9 C.A., 1962, held that a pilot must expect and anticipate the liklihood of conflicting traffic and use precautions to avoid it.

From the undisputed evidence, from the rate of descent, the time necessary to see an aircraft 500 feet below the clouds and the time that it would take the DC-9 pilots to see the aircraft at the undisputed rate of descent, the DC-9 could not have avoided colliding with the Piper Cherokee regardless of its distance below the clouds. The Trial Court would not even have to indulge in inferences but could draw only one conclusion from the evidence and that is that the pilots of the DC-9 failed to use ordinary care in their rate of descent and that such failure proximately caused the mid-air collision.

In his opinion Judge Swygert stated, "it might be established that Allegheny's excessive rate of descent was not the proximate cause of its injuries". The Court of Appeals was not sitting as trier of the fact and as such it was not their duty nor their right to say what "might be established" as the proximate cause. Proximate cause is always for the trier of the fact and not the reviewing court. Inasmuch as the evidence on this point was almost undisputed evidence, the Court of Appeals could not arbitrarily say that this finding of fact was clearly erroneous because even if they would differ with the conclusion drawn by the Trial Judge the differing of conclusions is not sufficient to disturb the findings of fact of the trier of the fact.

United States v. *Yellow Cab*, Ill. 1949, 70 S. Ct. 177, 338 U.S. 338, 94 L. Ed. 150.

II.

Did the Court of Appeals err in determining that Forth Corporation was vicariously liable for the acts of the pilot pursuant to the Uniform Aeronautics Act which holding is in contradiction with other circuits interpreting similar statutes?

Robert W. Carey was a student pilot who had rented the Piper Cherokee from Forth Corporation which was the owner of the aircraft and was conducting a flying school. Robert W. Carey was solo on a cross country flight at the time of the mid-air collision.

Allegheny Airlines, Inc. contended that Forth Corporation was vicariously liable because of certain Indiana Statutes Code Nos. 8-21-3-1(h), 8-21-4-8 and 8-21-4-5 Appendix C.

Admitting that there was no controlling case law in Indiana the Court of Appeals adopted the rationale of three cases:

> *Hoebee* v. *Howe,* 98 N.H. 97, A2d 223, 1952,
> *Hays* v. *Morgan,* 5 C.A., 1955, 221 F.2d 481,
> *Lamasters* v. *Snodgrass,* 248 Iowa 1377, 85 N.W. 2d 622, 1957.

and decided that Indiana would follow this rationale citing in support thereof, *Ross* v. *Apple,* 240 NE 2d 825, 143 Ind. App. 357, 1968.

Ross v. *Apple,* supra, decided that the trial court had erred in sustaining a demurrer to a complaint which had raised the question of the absentee owner's liability under similar Ohio Statutes with the comment:

> "Whether such considerations (citing Hays v. Morgan, supra) would demand the same result in Ohio is now the question here. Rhetorical paragraphs 9 through 16 of the amended complaint clearly state facts sufficient to raise this issue and the plaintiff-appellant should be given an opportunity to introduce his evidence on that point." [parentheses ours]

Hays, supra, was a case decided by the Court of Appeals of the Fifth Circuit and had held the owner liable.

True, that the three cases of *Hays, Hoebee and Lamasters,* supra, decided between 1955 and 1957 affixed

liability to the absentee owner based upon statutes similar to those of Indiana. However, Indiana modeled its statute after the federal statute which is now 49 USC 1301(26).

A thorough search shows that only two cases decided this issue (one for and one against liability of the owner) until 1968. Then in rapid succession various courts decided cases involving either 49 U.S.C. 1301(26) or similarly worded state statutes and in each case the Court held that vicarious liability did not attach to the owner and the statute was not intended to impose civil liability on the owner for the negligent acts of the operator. These cases are:

McCord v. Dixie Aviation Corp., 10 C.A., 1971, 450 F2d 1129,

Rogers v. Ray Gardner Flying Service, Inc., 1970, C.A. 5 Tex., 435 F.2d 1389, 11 ALR Fed. 891, cert. denied, 401 U.S. 1010, 28 L.Ed. 2d 546, 91 S. Ct. 1255,

Yelink v. Worley, 1968, D.C. Va., 284 F. Supp. 679,

Rosedail v. *Western Aviation, Inc.*, D.C. Colo., 297 F. Supp. 681, 1969,

Haskins v. *Northeast Airways, Inc.*, Minn. Sup. 123 NW2d 81,

Ferrari v. *Byerly Aviation*, — Ill. App. —, 268 NE2d 558.

In the case of *McCord* v. *Dixie Aviation*, supra, Tenth Circuit Court of Appeals said:

> "The hard core 'public policy' issue raised by the appellants here goes to the 'deep pocket' theory . . . appellants contend that it is the 'deep pocket' of the fixed base operator who has the most assets to reach and that, as a matter of public policy, it would be convenient, logical, and consistently evenharded to impute negligence to the fixed base operator. Our response is that if Congress had intended to impose strict liability on the owner-bailor it was

> capable of clearly and directly so providing . . . The Act particularly provides that nothing therein shall in any way abridge or alter the remedies now existing at common law or by statute."

As said previously Indiana modeled its Uniform Aeronautics Act after the Federal Aviation Act as it existed in 1927. Even then, Indiana adopted the following statute:

> "The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land." *Indiana Code 8-21-4-5.*

So as the Federal statute provides that nothing therein shall abridge the remedies existing at common law or by statute, the Indiana Uniform Aeronautics Act provides that the law of torts in aircraft shall be governed by the law of torts on land.

It is well settled law in Indiana that the owner of a vehicle is not liable for the acts of the operator without the showing of agency, respondeat superior, negligent entrustment or a defective instrumentality.

> *Jay* v. *Holman,* 106 Ind. App. 413, 20 NE2d 656, 1939.

If it were only a question of the narrow interpretation of Indiana law, we could easily say that the Court of Appeals merely misread the Indiana law or looked no further than the Appellant's Brief to search out the true construction of the statute. But a written decision by such a high tribunal as the Court of Appeals should not be so lightly dismissed. 49 U.S.C. 1301(26) is the model for every similar statute in every state where the Uniform Aeronautics Act has been or will be adopted. As shown above, already in the Fifth Circuit, the State of Mississippi has

interpreted the modeled statute one way and the Court of Appeals has interpreted it a different way.

The Tenth Circuit has given the same interpretation as the Fifth Circuit.

In the Seventh Circuit, the Supreme Court of Illinois in *Ferrari* v. *Byerly,* supra, unequivocably ruled that a statute the same as the Indiana statute, imposed no liability on an absentee owner. Then the Seventh Circuit Court of Appeals in this case rules directly contrary to the existing majority and prevailing view.

Thus, there are not only conflicts between the Circuits but conflicts within the Circuits in the interpretation of identically worded statute.

Air traffic transcends State and Circuit lines. If the Uniform Aeronautics Act is to be a Uniform Act and to serve the purpose for which it is enacted by the several states and the United States, then it is imperative in the public interest and the interest of justice that there be a uniform interpretation of 49 U.S.C. 1301(26), Indiana 8-21-3-1, Illinois Chapter 15½, Section 22.11, Ill. Rev. Stat. 1965 and all other exact worded statutes.

Orderly developed law leads to an orderly developed society and orderly justice.

III.

Whether or not the application of the doctrine of collateral estoppel against a litigant deprives the litigant of his rights to a trial by jury.

The issues in this case are interdependent. The Trial Court granted the motion of the Defendant United States of America, made pursuant to Rule 41(b) F.R.C.P. to dismiss on the theory that the evidence showed the Plaintiff Allegheny Airlines, Inc., was contributorily negligent and could not recover.

This was a final judgment. The Defendants Forth Corporation and Lee LeMay, Administrator, et al, filed a motion for summary judgment under the doctrine of collateral estoppel.

The Court granted the motion for summary judgment and entered judgment on behalf of said Defendants Forth Corporation and Lee LeMay, Administrator, et al.

As otherwise set out in this petition, if this Court does not find that the evidence supports the Trial Judge's findings and the granting of the Rule 41(b) F.R.C.P. motion, then of course, there would be no valid judgment on which to base a finding of collateral estoppel.

In its opinion, the Court of Appeals held the findings of the Trial Court to be clearly erroneous and the Trial Court erred in sustaining the motion for summary judgment on the theory of collateral estoppel. Clearly, this issues rises or falls with the issue of whether or not the Trial Court's findings of contributory negligence on the part of Allegheny Airlines, Inc. was supported by the evidence or clearly erroneous.

However, this portion of this petition is not concerned with the aforementioned but rather with the footnote in which the Court of Appeals holds that while they are not directly passing on the propriety of the Trial Court's action in implementing the doctrine of collateral estoppel,

> "... we are impelled to say that we strongly disapprove of the procedure utilized."

The Court of Appeals held that the procedure used,

> "... in substance short circuits plaintiffs' right to a trial by jury. ..."

As authority for its position, the Court of Appeals cites the case of *Rachal* v. *Hill,* 435 F.2d 59, 5 CA, 1970.

The *Rachal case,* supra, relied upon by Judge Swygert in his opinion involves litigation arising out of complex

corporate S.E.C. violations and shareholder suits. For purposes of this petition, however, a judgment was entered against a litigant in a prior S.E.C. injunction suit. This same litigant filed suit as a plaintiff in a second lawsuit on the same issue. In the second lawsuit the doctrine of collateral estoppel was implemented and the plaintiff in the second lawsuit was prevented any recovery because of the judgment rendered against him in the prior S.E.C. injunction suit.

The issue involved in the *Rachal case,* supra, is since the litigant in the prior S.E.C. injunction lawsuit had no right to a jury trial in that litigation, and since it had a right to a jury trial in the second litigation, the use of collateral estoppel circumvented its right to trial by jury in the second suit.

In deciding the *Rachal case,* supra, the Court of Appeals relied heavily upon *Beacon Theaters* v. *Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988, 1958. The *Beacon case,* supra, sets out the general rule that a judgment in a prior suit under 28 U.S.C. § 2201, 2202, the Federal Declaratory Judgment Act, may not be used to support the doctrine of collateral estoppel and cause a second suit to be dismissed if the issues in the second suit are the same, and may be tried by a jury.

The *Beacon case,* supra, fundamentally deals with a situation where issues in equity and law may be tried either separately or together. Since this order of trial is discretionary with the trial judge and since there is no trial by jury under 28 U.S.C. §§ 2201, 2202, the trial judge by his discretion could pick the equity issue to be tried first. If this were determined adversely to a party his right to a trial by jury could be lost on the same issue. It should be pointed out that the *Beacon case,* supra, deals only with equity issues such as injunctions or declaratory judg-

ments under 28 U.S.C. §§ 2201, 2202, being decided first and preventing a later trial.

The *Rachal case,* supra, also dealt with prior S.E.C. injunction hearing, an equitable hearing.

These cases are not dispositive of the issue here, however. The cases tried before the Trial Judge in the matter at bar were both cases involving questions of law. The United States of America's case was tried under the Federal Tort Claim Act for which no jury trial is available. The same plaintiff's case as to the other defendants was tried to a jury.

The basis for the doctrine of collateral estoppel is to prevent the same issue from being tried twice. The case of *Blonder-Tongue Labs* v. *University Foundation,* 402 U.S. 313, 28 L.Ed. 2d 788, 91 S. Ct. 1434, sets out that the real and only question is whether or not the party against whom the prior judgment is being assessed under the doctrine of collateral estoppel had a full and fair opportunity for judicial resolution of the same issue. A party who has had an opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time.

The case at bar, where all parties were present, participated, and cross-examined, was the classical case for allowing a judgment against one defendant to be used by other defendants as collateral estoppel.

The cases relied upon by Judge Swygert in his opinion are where there was a prior decision wherein such decision was in a Court of Equity in a declaratory judgment or injunction proceeding. A Judge sitting in those proceedings operates under a different criteria than a Judge sitting as trier of fact in a Federal Tort Claims case. If the opinion of the Court of Appeals is permitted to stand in this case, there would be no instance where a judgment rendered

under the Federal Tort Claims Act could be utilized as a defense of prior adjudication under the doctrine of collateral estoppel. No case relied upon by the Court of Appeals supports this holding and it is definitely in opposition to the doctrine set out in *Blonder-Tongue Labs* v. *University Foundation case,* supra.

CONCLUSION

For the foregoing reasons, the Joint Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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